



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 18 OF 2019

TERESA WANGECHI KING'ORI.....APPELLANT

-VERSUS-

JOYCE MUTHONI MWANGI

(Suing as the legal representative of the estate of Peter Mwangi Muriu).....**1ST RESPONDENT**

COUNTY GOVERNMENT OF NYERI.....2ND RESPONDENT

(An Appeal from the Judgment of Hon. W. Kagendo (C.M) in the Chief Magistrate's Court

at Nyeri, Civil Case No.351 of 2016, delivered on 28th February 2019)

JUDGMENT

1. The 1st Respondent sued the Appellant and 2nd Respondent in the lower Court seeking; vacant possession of stall No. 12255 by the Appellant, mesne profits, costs of the suit and interest. She averred that the stall was beneficially owned by her late husband by virtue of being licensed to him by the 2nd Respondent (*County Government*).
2. The deceased rented the stall to the Appellant on a temporary basis but after his demise, she stopped paying the monthly rent. The 1st Respondent obtained representation over her husband's estate and wrote to the County Government seeking to have the stall transferred to her but was informed that it had been registered in the 1st Respondent's name. She averred that there was collusion between the Appellant and County Government to disinherit her as the County Government lacked any mandate to transfer the stall to the Appellant.
3. The Appellant filed her statement of defence and denied all the averments in the plaint save for what she admitted expressly. She admitted that in November 2012, she rented the stall from the deceased for a monthly rent of Kshs.6,000/= but in May 2013, the deceased offered to transfer the stall to her, surrendered all the documents and they executed an agreement to that effect. Consequently, she averred that, she became the owner of the licence which was pending.
4. There was no response from the County Government and the record does not indicate whether an interlocutory judgment was entered against it.
5. After the preliminaries, the matter proceeded for hearing and Judgment was eventually delivered in favour of the 1st Respondent.
6. Aggrieved by the finding, the Appellant filed this appeal through the firm of Nderi & Kiingati advocates and listed five grounds as follows:
 - a) *The learned trial Magistrate erred in law and fact in failing to properly direct her mind to all the evidence before her, thereby misdirecting herself and arriving to the wrong conclusion*
 - b) *The learned trial Magistrate erred in failing to address all the issues that were placed before her.*
 - c) *The learned trial Magistrate erred in law and fact in misapprehending the law regarding licenses particularly that there is no estate transferrable in a licence.*

d) *The learned trial Magistrate erred in law and fact in granting orders that had been sought by the plaintiff.*

e) *The learned trial Magistrate erred in law and fact in awarding mesne profits without proof.*

7. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. The Appellant was represented by the firm of Nderi & Kiingati Advocates while the 1st Respondent was represented by Gori, Ombongi & Co. advocates.

8. Relying on Order 21 of the Civil Procedure Rules (CPR) Mr. Nderi for the Appellant submits that, in writing a judgment, a trial court should concisely set out the statement of the case, issues for determination, the decision thereon and reasons for the decision. He submits that these tenets were not observed and that the trial court only succeeded in obscuring the issues that commended themselves for determination. He contends that there was gross dereliction of the trial court's duty to first evaluate the plaintiff's case and the result was that the burden of proof was shifted.

9. He further submits that it was difficult to apprehend the cause of action from the pleadings and it would have been prudent for the trial Magistrate to begin her inquiry there and offer clarity on the subject. Failure to do so, he contends, meant that the court sailed rudderless and abdicated its primary responsibility. He states that the plaintiff's case bordered on the tort of fraud and it is trite law that fraud must be particularized in the pleading. It is also his submission that the burden of proof must be higher than a balance of probabilities. He relies on the case of **Vijay Morjaria & Nansingh Darbar & Anor (2000) eKLR** where it was stated that;

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts."

10. Counsel submits that the 1st Respondent was on a fishing expedition hence focused all her energies to force her (Appellant) to prove her claim that she had already bought out the deceased from the stall. He contends that the same bait was thrown to the trial court and it swallowed it hook line and sinker. It's his submission that the burden of proof remains on the shoulders of the plaintiff always and never shifts to the defendant. She cites the **Halsbury's Laws of England, 4th Edn, Vol. 17 at para. 13 & 14** where it is stated as follows;

"The legal burden is the burden of proof which remains constant throughout the trial. It is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose."

11. He submits that it was incumbent upon the 1st Respondent to prove that; she (Appellant) had been a tenant of the deceased from 2012 to the date of filing suit and that the deceased had not sold his interest as claimed and to substantiate fraud. It is his submission that a licensee has no definite interest in Law and faults the 1st Respondent's position that the issue ought to have been pleaded for her (Appellant) to rely on it.

12. He states that one of the cardinal rules of pleadings is that a party should not plead the law. He has also faulted the trial court for finding a tangent in this issue and contends that it missed the basic point *to wit*; that upon the demise of the original licensee, there was no estate transmissible to the 1st Respondent.

13. It's his further submission that having already been registered as the new licensee; the issues before the court were not only rendered otiose but became an inquiry of the process of her registration hence purely academic. He contends that the regularity, legality and validity of such registration were neither here nor there. That the trial court appears to have been minded to grant an order for cancellation and rectification of the license while none had been sought. He relies on the case of **Margaret Waihera Wachira -vs- Mary Mwiwaki Simon (2009) eKLR** where Makhandia J (as he then was) expressed himself as follows;

"A license is not an interest capable of disposal nor is it transferrable. It is an interest that determines on the death of the licensee. A licensee therefore has no proprietary interest on such property whatsoever. The Respondent cannot therefore be accused of any wrongdoing for subsequently acquiring the said plot after the demise of her husband, the deceased. The deceased after all occupied the same on....license basis but the council subsequently offered it to the Respondent....it belongs and is the property of the Respondent solely. It never belonged to the deceased. Accordingly, it does not form part of the estate of the deceased or at all and cannot therefore be the subject of distribution."

14. In the circumstances, the Appellant wonders whether there was a competent suit that warranted the exercise of the trial court's jurisdiction.

15. Mr. Ombongi for the 1st Respondent on unaddressed issues, submits that all the issues raised by both parties were addressed in the judgment. He contends that the Appellant impressed these issues upon the trial court and is still doing it at the appeal stage.

16. With regard to the law on licenses, counsel submits that the crucial question that ought to be and was determined was whether the allocation of the stall was proper. He questions the Appellant's claim that the deceased offered to sell the stall due to financial constraints but the purchase price wasn't available until September 2013. It is his contention that it beats logic for the owner to wait for four months for monies he was in urgent need of. It is also his contention that if the owner had no interest capable of being transferred upon his death, he equally did not have a transferrable interest on purchase.

17. He submits that the Appellant did not plead lack of a transferrable right in a license but raised the same in open court hence an afterthought. He argues that there were two different dates on the purported sale agreement between the Appellant and the deceased and neither the Appellant nor her witnesses could explain the inconsistency.

18. On the other hand, he contends that the 1st Respondent's evidence was consistent and she followed the due process in acquiring the stall. He submits that the Appellant pleaded a defence she could not prove and raised another defence in Court that she had not pleaded. He further submits that the Appellant was so confused in her testimony that she could not stick to one claim.

19. He reiterates that the standard of proof in civil cases is on a balance of probabilities and supports the trial courts judgment.

Analysis and determination

20. It is now settled that the duty of a first appellate court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle and Another –vs- Associated Motor Boat co. Ltd & others (1968) E.A 123.**

21. Having considered the grounds of appeal, the rival submissions and entire record, the following issues arise for determination;

- a) What was the 1st Respondent's cause of action?
- b) Whether the 1st Respondent discharged her burden of proof.

What was the 1st Respondent's cause of action?

22. In **Letang –vs- Cooper [1964] 2 All ER 929 at 934**, Lord Diplock defined cause of action as follows: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

23. In **Drummond Jackson –vs- Britain Medical Association [1970] 2 WLR 688**, Pearson J defined a cause of action as follows:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

24. At paragraph 10 of the plaint, the 1st Respondent pleaded as follows;

“It is the plaintiff's claim that the 1st defendant colluded with the 2nd defendant through the 2nd defendant's department of public administration, information and communication to illegally transfer ownership of stall No. 12255 (below batian b) to the 1st defendant.”

25. It is therefore evident that the act complained of by the 1st Respondent was 'collusion between the Appellant and County Government which collusion ended up in illegal transfer of the stall's ownership to the Appellant.' I therefore agree with the Appellant that the 1st Respondent's case bordered on the tort of fraud and it is trite that fraud must be particularized in the pleadings. It is also trite that the standard of proof for fraud is slightly higher than the standard in civil matters.

Whether the 1st Respondent discharged her burden of proof

26. Having established what the cause of action was, it was incumbent upon the 1st Respondent to prove the particular acts which constituted fraudulent conduct between the Appellant and County Government. At this point, this case becomes untidy because the particulars of fraud were not pleaded and there is no interlocutory judgment against the County Government hence it cannot be said that there is a finding of liability on its part.

27. Be that as it may, it is my considered view that even if an interlocutory judgment was in place, the 1st Respondent would still be expected to prove the fraudulent conduct on the part of the Appellant that resulted in her registration as the owner of the stall.

28. The 1st Respondent was **Pw1** and she testified that the deceased was her husband and he died on 14/01/2016. She stated that the single business permit for the year 2016 was in the deceased's name. Basically, her evidence was that the Appellant had not proved that she purchased the store from the deceased and that she was only a tenant since she got there in 2013.

29. She testified that the below batian committee is involved in sales and purchases as they issue a letter which is then taken to the council. She said that the committee summoned both of them to arbitrate the dispute and resolved that the stall belongs to the Appellant. She did not agree with the finding.

30. Further, she testified that she wrote to the council and demanded to be shown the documents that were relied upon to effect the transfer but there was no response. She wondered why the Appellant waited from 2013 to 2016 to effect the transfer and said that the Appellant should explain how she was able to change the registration of the stall.

31. Upon cross examination, she said that no money was paid to her husband as she would have known if it had been paid. That the husband used to tell her everything about the store hence he would have informed her about the sale. The rent was being collected by the deceased but he was not issuing any receipts. She knew that the Appellant used to pay rent because the deceased would tell her about it. She however agreed that she never accompanied the deceased at any time to collect rent.

32. **Pw2** was **Ann Wangui Ngui**, the secretary of Batian traders. She testified that anyone wishing to sell the shed had to go through them. That the Appellant had no claim to the shed and was just a tenant of the deceased. Upon cross examination, she said that Batian traders are the stall owners who conduct business there. The actual owner of the stalls is the County Government of Nyeri and it gives out licenses. That the County Government has not sold the stalls to individuals but if one is tired of their stall, they can sell the licence.

33. **Pw3** was **Joseph Mukumi Ruo**, the chairman of the below batian traders. He testified that their group is registered and is recognized by the County Government. They sat as a committee to arbitrate the dispute between the Appellant and 1st Respondent and after listening to both sides, they saw that the Appellant had no document to show that she bought the stall. They concluded that the stall belongs to the 1st Respondent. On cross examination, he said that he was aware that the case was arbitrated at the County Government and the administrator said that the Appellant was the owner of the stall.

34. The Appellant's case was that she bought the stall in 2013 and ceased being the deceased's tenant.

35. After re-evaluating the evidence, the case seems to have changed from one of fraudulent conduct to whether or not the Appellant had bought the stall from the deceased. The burden of proof did not shift from the 1st Respondent and she did not adduce any evidence that this court can rely on to make a finding of fraud. I agree with the Appellant that in the absence of proof of fraud, the question of how the Appellant got registered as the stall owner is neither here nor there. Further, I associate myself with the sentiments of Makhandia J (as he then was) in the **Margaret Waithera case (supra) to wit**, that a licence does not form part of a deceased's estate or at all and cannot therefore be the subject of distribution.

36. On the flipside, a license can be bought out as explained by Pw2 but upon the death of the licensee, his/her beneficiaries cannot lay claim to the licence as part of the deceased's estate. Indeed, the trial Magistrate seems to have misapprehended the law on licences when she expressed herself as follows;

“This issue was not pleaded and it did not feature in the evidence at all. But even if that is the correct position, that argument works against them. That is because technically, it can then be argued that peter Mwangi being a licensee and had no title which he could have sold to the 1st defendant and consequently, the agreement she is seeking to enforce is void.”

37. The issue of whether a licence can be inherited is a point of law and as correctly submitted by the Appellant, it need not be pleaded.

38. The upshot is that the 1st Respondent did not prove fraud on the part of the Appellant and County Government and her case should have been dismissed.

39. Finally I find the appeal to be meritorious and I allow it. The judgment by the trial court is set aside and substituted with an order dismissing the suit with costs. The Appellant gets the costs of the appeal.

Orders accordingly.

Dated and signed this 13th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge